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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ADRIAN PEREZ,

Defendant and Appellant.

D069263

(Super. Ct. No. SCN331054)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed.

Steven J. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Francisco Adrian Perez guilty of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ and one count of first degree burglary (§ 459), along with other true findings. Perez admitted a prison prior (§§ 667.5, subd. (b), 668), a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a prior strike (§§ 667, subd. (b)-(i), 1170.12, 668).

Perez filed a motion for a new trial, alleging that defense counsel was ineffective in representing him during trial because he failed to properly investigate the facts of the case. The trial court held an evidentiary hearing, and denied the motion.

The trial court sentenced Perez to prison for a term of 14 years.

Perez appeals from the denial of the motion for a new trial, contending that the trial court abused its discretion in concluding that Perez had not met his burden to establish ineffective assistance of counsel. We conclude that Perez's argument lacks merit, and we accordingly affirm the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Crime and Trial Proceedings*

In April 2014, Timothy Razo and his friend Rodrigo Montillo were living in a detached bedroom behind Razo's parent's house in Fallbrook (the backroom). Razo and Montillo had recently met Perez and spent time with Perez in the backroom.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

In the early morning hours of April 9, 2014, shortly past midnight, Razo and Montillo were asleep in the backroom. According to Razo's testimony at trial, he was woken up by a knock on the door. Razo went to the door, looked through the door's window, and asked who it was. Razo recognized Perez's voice identifying himself as "Smokey," which is Perez's nickname. Perez asked if Montillo was home, and Razo opened the door. As Razo testified, Perez grabbed him and pushed him outside, and then rushed into the backroom where Montillo was asleep in bed. Perez attacked Montillo, and then ran out of the backroom toward Razo and attacked Razo before fleeing.

Montillo described the attack at trial but stated that he could not identify the person attacking him because it was dark and the attack was sudden. Razo, in contrast, told authorities immediately after the attack that he recognized Perez as the attacker and was able to see him during the incident. At trial, Razo testified that he was 100 percent sure that Perez was the attacker.

Razo's father transported him to the hospital, where Razo was treated for two stab wounds to his neck that caused a collapsed lung and internal bleeding from his carotid artery. Razo also had an orbital wall fracture to his left eye.

Montillo did not go to the hospital. He self-treated his wounds, which consisted of an injury to his scalp at the hairline above his eyebrow, as well as several stab wounds to his neck, chest, hand and arm. According to Montillo, only the head wound was bleeding.

Before Razo went to the hospital, he told Montillo that Perez was the attacker. Montillo called 911 after Razo left for the hospital to report that Perez had attacked them.

Although a clear motive for the attack was not identified, Montillo speculated to police that Perez may have been angry that Montillo told him not to come around anymore, and Razo told police that he believed Perez may have had a "beef" with Montillo.

The police investigated the crime scene and took numerous photographs, but no physical evidence connected Perez to the attack. A claw hammer was found outside the door to the backroom with Montillo's blood on it, but no fingerprints or DNA evidence was found on the hammer to connect it to Perez. The jury also heard testimony, elicited by defense counsel during the cross-examination of Deputy Sheriff Steven Gill, who responded to the crime scene, that there was evidence of a forced entry into the backroom, as the doorway leading into the backroom appeared to be damaged and a piece of wood related to that damage was lying on the ground.

Perez was charged with two counts of attempted murder (§§ 187, subd. (a), 664); two counts of assault with a deadly weapon (§ 245, subd. (a)(1)); and one count of first degree burglary (§ 459).

In his closing argument, defense counsel James Dicks focused on the contention that Razo's identification of Perez was not credible, as there were several inconsistencies in Razo's testimony, including his claim that he opened the door to Perez, when the evidence showed that there had been a forced entry. Dicks argued that the evidence showed that the hammer found near the door to the backroom was used to pry open the door and then to inflict the injuries on Razo and Montillo. Dicks also argued that the

victims' account of the incident was inconsistent with the evidence because in the crime scene photographs no blood appeared on the bed, but Montillo said he was attacked there.

The jury found Perez not guilty of attempted murder, but convicted him of the two assault counts and burglary. For both of the assault counts, the jury found that Perez used a dangerous and deadly weapon (§ 1192.7, subd. (c)(23)) and for the assault count naming Razo as a victim, the jury found that Perez personally inflicted great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)). For the burglary count, the jury found that the burglary was of an inhabited building (§ 460) and that a person other than an accomplice was present in the residence (§ 667.5, subd. (c)(21)). Perez also admitted a prison prior (§§ 667.5, subd. (b), 668), a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a prior strike (§§ 667, subd. (b)-(i), 1170.12, 668).

Following the resolution of the motion for a new trial, which we will discuss below, the trial court sentenced Perez to a 14-year prison term.

B. *Motion for a New Trial*

Prior to sentencing, Perez filed a motion for a new trial, alleging that Dicks was ineffective in representing him during trial because he failed to properly investigate the facts of the case and prepare for trial. Specifically, Perez argued that Dicks had fallen below the standard of care by failing to hire an investigator, a criminalist and a pathologist. Perez contended that those three types of experts would have assisted Dicks in developing evidence that would have changed the outcome of the trial.

The trial court held a multi-day evidentiary hearing on the motion for a new trial. In support of the motion, Perez presented the testimony of three expert witness.²

1. *Perez's Expert Witnesses*

a. *Attorney John Cotsirilos*

Attorney John Cotsirilos reviewed the trial transcript, the crime scene photographs, the police reports and Dicks's case file, as well expert declarations from a criminalist and pathologist retained to support the motion for a new trial. Based on these materials, Cotsirilos concluded that Dicks did not meet the applicable standard of care in representing Perez because he did not hire an investigator, a criminalist or a pathologist in preparation for trial.

With respect to the hiring of an investigator, Cotsirilos explained that it appeared there was "almost nothing done in preparation for this case in terms of investigation." According to Cotsirilos, a competent attorney would have interviewed witnesses to investigate Razo and Montillo's relationships and their activities at Razo's house, and would have investigated Perez's background and his activities leading up to the events of April 9, 2014.

² Perez also testified at the evidentiary hearing and presented testimony from his mother and his mother's friend, both of whom testified that after Deputy Gill testified about the forced entry, Dicks seemed surprised about the testimony, and that prior to Deputy Gill's testimony, Dicks had not mentioned the issue of forced entry when discussing with them the points he planned to raise during closing argument. These witnesses were used to develop Perez's theory that Dicks did not hire a criminalist to testify about the forced entry because he did not even *realize* there had been a forced entry until Deputy Gill mentioned it during cross-examination.

Regarding the hiring of a criminalist, Cotsirilos testified that the first thing competent defense counsel would do in a case like this after viewing the crime scene photographs would be to hire a criminalist to use those photographs to explain what happened during the incident and to assess whether the evidence is consistent with the witnesses' accounts. Cotsirilos testified that Dicks should have consulted with a criminalist about (1) the evidence of forced entry into the backroom; (2) the fact that no physical evidence connected Perez to the crime scene; and (3) the possibility that the blood pattern evidence found at the scene was inconsistent with Razo's and Montillo's version of events.

Most of Cotsirilos's comments regarding the hiring of a criminalist focused on the issue of forced entry. Cotsirilos stated that it was "basic error" not to have a criminalist testify at trial about the evidence of forced entry because "if there are issues you are arguing based on the crime scene, you get a criminalist." Cotsirilos observed that Dicks presented the evidence of forced entry during the cross-examination of Deputy Gill, and in doing so, Dicks incorrectly referred to the part of the door that had been pried off as the "doorjamb" rather than the window molding of the door's window. According to Cotsirilos, this approach resulted in testimony that "factually mischaracterized the entry" and thus may not have been credible to the jury. Further, Cotsirilos stated that if Dicks had consulted a criminalist about the forced entry, he could have presented evidence that

the forced entry appeared to be "fresh" and the damage to the window molding was not accidental.³

As to the hiring of a pathologist, Cotsirilos testified that another "basic preparatory step[]" prior to trial would be to hire a pathologist to determine what type of a weapon was used in the attack. Cotsirilos explained that a pathologist could have looked at the photographs of the victims' wounds to determine two things important to the case. First, the pathologist would have advised Dicks that the wounds could not have been caused by the hammer, contrary to the theory that Dicks presented during closing argument. Cotsirilos contended that it would be obvious to a lay person that the wounds were not caused by the hammer, and in arguing that the hammer caused the wounds, Dicks destroyed his credibility with the jury, a mistake that Dicks would have avoided had he consulted with a pathologist. Second, Cotsirilos explained that a pathologist would have been able to develop the theory that there were two different weapons used during the attack, and that, accordingly, there may have been two attackers, casting doubt on Razo's and Montillo's version of events.

b. *Criminalist Lisa Allen DiMeo*

Criminalist Lisa Allen DiMeo explained that she had reviewed the trial transcripts, the police report, the photographs of the crime scene and Razo's medical records. Based

³ Cotsirilos did acknowledge, however, that Dicks was not at fault for failing to confront Razo with the evidence of the forced entry to impeach Razo's claim that he had opened the door for the attacker. Cotsirilos stated that it may have been more powerful to let the strength of the evidence of the forced entry speak for itself rather than to bring it up during cross-examination of Razo.

on that review, DiMeo concluded there was evidence of forced entry into the backroom, in that the molding from the window on the door that held in the window screen had been pried off and the screen had been pushed in, affording easy access to the door handle. The window molding could not have come off accidentally, and the damage was *not* to the doorjamb, as was stated at trial during Deputy Gill's testimony, but to the window molding on the door. DiMeo also testified that (1) the crime scene had been altered before the photographs were taken, as someone had put bedding in a trash bag and had cleaned up blood from the floor; and (2) there were several blood stains on the neck of the hammer, but there appeared to be no biological material on the hammer's head or its claws, and none of the victims' injuries appeared to have been made by the hammer claws.

c. *Pathologist Christopher Swalwell*

Pathologist Christopher Swalwell testified about the likely cause of Razo's and Montillo's injuries, based on his review of photographs of the injuries, medical records, police reports and some of the trial testimony. Swalwell concluded that all of Razo's wounds were likely from the same weapon, which was some kind of a thin, narrow flat instrument such as a flathead screwdriver or a thin small knife. Montillo's injuries, in contrast, were more rounded than Razo's and likely caused by an instrument such as a Phillips screwdriver or an awl. Despite the differences in Razo's and Montillo's wounds, Swalwell could not exclude the possibility that they were caused by the same instrument, although he believed it was more likely that two different instruments were used.

Swalwell also concluded that none of the injuries on either victim could have been caused by the claws of the hammer.

2. *The People's Witness James Dicks*

The People called Dicks as a witness in opposition to Perez's motion for a new trial. Dicks testified that he is a certified specialist in criminal law with approximately 25 years of experience as a criminal defense attorney. Before becoming an attorney, Dicks worked as a police officer for 10 years and currently has a license as a private investigator. Dicks explained that he usually conducts his own investigations into the matters he is handling by using in-house staff, whom he has trained. In this case, in addition to reviewing the discovery produced by the People, he went to the crime scene, he spoke to Perez's mother, he pressed the People to act on a subpoena to obtain the victims' Facebook information, and he found out that Montillo "had a warrant out." Dicks explained that he did not hire an investigator because he has the capability to conduct his own investigations.

According to Dicks he did not hire a criminalist because, after formulating his trial strategy, he "was fairly confident" that he could present the required evidence at trial without a criminalist. Specifically, he decided that the best strategy was to pursue the theory that Razo had intentionally misidentified Perez and that the attacker used the hammer to break into the backroom to attack the victims. In connection with this theory, he would show that there was no physical evidence found on the hammer to suggest that Perez was the attacker.

Regarding the evidence of forced entry, Dicks testified that although forced entry was not mentioned in the police reports, he first noticed that there had been a forced entry when he reviewed the crime scene photographs, and the evidence of forced entry was a "crucial part of our defense." Dicks decided that it would be best to present the evidence of forced entry while cross-examining Deputy Gill because it would be more believable and effective for a law enforcement officer called as a prosecution witness to state that there had been a forced entry rather than a criminalist called as a witness by the defendant. Dicks also decided against cross-examining Razo about the forced entry because Razo was one of the first witnesses and he did not want to reveal his strategy about the forced entry to the People too early in the trial, as that would give them a chance to develop an approach to counter that evidence. Accordingly, Dicks made a strategic decision to not bring up the forced entry until near the end of the trial during Deputy Gill's testimony.

As Dicks testified, he also did not think it was necessary to have a criminalist testify about the cleanup of the crime scene and the bedding stuffed into a trash bag because his strategy was to argue that the lack of blood on the bed where Montillo said he was attacked suggested that the true facts of the attack were different than the victims' accounts.

Dicks explained that he did not hire a pathologist to opine on the type of weapon that caused the victims' wounds because "I don't know how it would have helped." His strategy was to argue that the hammer claws had caused the victims' wounds and to point out that no DNA or fingerprint evidence from Perez was on the hammer. According to

Dicks, the victims' wounds looked to him to be a "perfect match" to the hammer claws, which he confirmed by going to Home Depot to look at a hammer, so that a pathologist's testimony was not needed to establish that fact for the jury.

Dicks explained that he also did not want to hire a pathologist to develop the theory that there were two weapons used and thus possibly two attackers involved. The presence of a second attacker and a second weapon would provide the jury with an explanation for why Perez's DNA and fingerprint evidence was not found on the hammer even though he was at the crime scene, as the second attacker could have used the hammer.

In the course of his testimony, Dicks also explained that another reason he decided against hiring experts was that he was worried about highlighting potentially harmful evidence to the prosecution. Specifically, Dicks stated that during his investigation of the case, he became aware of a telephone conversation that Perez had with his mother from jail after he was arrested. In that conversation, Perez told his mother to get rid of some shoes and pants, and Dicks thought that evidence of the conversation would be harmful to the defense if the prosecution noticed it and presented it at trial. Dicks testified that he believed that he would be required to turn over the jail call recordings to any expert he hired, which might end up highlighting the evidence for the prosecution. Dicks also explained that his concern about the jail call conversation was a reason that he decided against calling Perez's mother or Perez to testify.

3. *The Trial Court's Ruling*

The trial court denied the motion for a new trial in an oral ruling, concluding that Dicks did not render ineffective assistance of counsel. The trial court explained at length why Perez had not established that Dicks failed to meet the applicable standard of care in deciding not to hire an investigator, a criminalist and a pathologist. The trial court also concluded that there was no showing that Perez was prejudiced as a result of any of the alleged errors. Further, the trial court observed generally that Dicks "put a lot of thought and effort into the matter" and did a "good job" of examining witnesses, addressing legal issues and arguing to the jury.

a. *Hiring an Investigator*

Regarding the hiring of an investigator, the trial court noted that Dicks had a law enforcement background and his staff was trained in investigative techniques. The trial court found that Perez had not demonstrated that a different investigative approach was required, and Perez failed to present any evidence of what specific evidence, helpful to the defense, would have been uncovered had Dicks investigated further.

b. *Hiring a Criminalist*

In addressing whether Dicks fell below the standard of care in failing to hire a criminalist to testify about the forced entry, the trial court first rejected Perez's suggestion that Dicks did not realize that there had been a forced entry until Deputy Gill testified. The trial court explained that based on what it observed during Dicks's cross-examination of Deputy Gill, Dicks did not seem surprised by the testimony and immediately followed up with the right questions on the issue. The trial court also observed that because the

evidence of forced entry was obvious from the crime scene photographs, it was unlikely that Dicks could have overlooked it. Indeed, as the trial court found, Dicks credibly testified at the evidentiary hearing that his trial strategy was to bring out the evidence of forced entry while cross-examining Deputy Gill.

The trial court observed that Dicks did not ignore the issue of forced entry, and instead he presented the evidence through the testimony of Deputy Gill. As the trial court explained, the evidence "wasn't overlooked. It came out through the testimony."

Addressing whether it was significant that Deputy Gill's testimony referred to damage to the "doorjamb" rather than the window molding, the trial court explained that based on its examination of the crime scene photographs presented to the jury, it was obvious what type of forced entry was being described, and "doorjamb" was simply a mistaken use of words, not a misunderstanding of what the evidence showed.

The trial court also rejected the argument that a criminalist was needed to testify that the crime scene had been cleaned up to show that Montillo and Razo were hiding something. As the trial court explained, an argument that Montillo and Razo were trying to cover up evidence by cleaning up the crime scene would have been a weak argument because it was a very poor clean-up effort, as shown in the crime scene photographs. Further, Dicks had a sound strategy in arguing that the lack of blood on the bed contradicted Montillo's account that the attack occurred on the bed, and hiring a criminalist to testify that the crime scene had been cleaned would have detracted from that argument.

Addressing the issue of prejudice, the trial court explained, "There's no evidence presented that the criminalist helps the case," and "the forced entry issue was broached and was utilized."

c. *Hiring a Pathologist*

Finally, regarding Dicks's failure to hire a pathologist to opine on the type of weapon or weapons that caused the victims' wounds, the trial court stated, "I don't believe in this case a pathologist would have helped the defense[,] and observed that Dicks had "articulated why he did not seek such an opinion."

The trial court explained that given the presence of Montillo's blood on the hammer and the lack of Perez's fingerprints or DNA on the hammer, Dicks reasonably argued that the hammer was used in the attack. Hiring a pathologist would not have advanced that argument, and would have "cut against the grain of the defense theory."

The trial court also found that it would not have helped the defense to establish through a pathologist that two weapons were used during the attack in an attempt to show that two attackers were present, as a single perpetrator could simply have used more than one weapon or could have used a single tool with two different ends. Moreover, even with testimony from a pathologist about the likelihood that two weapons were involved, it was still "pure speculation" that there were two attackers, as no other evidence pointed to that fact. As the trial court observed, given the limits of the pathologist's ability to identify the weapons used, even had Dicks hired a pathologist, the jury would still be "left with no clear evidence regarding the weapon or weapons."

Based on these observations, the trial court concluded that Dicks had not fallen below the standard of care in failing to hire a pathologist, and even if he had, Perez had not established any prejudice.

II.

DISCUSSION

Perez's sole argument on appeal is that the trial court erred in denying the motion for a new trial because the evidence established that Dicks was ineffective in representing him.

A. *Applicable Legal Principles*

Although not among the statutory grounds for a new trial set forth in section 1181, ineffective assistance of counsel is a valid ground for a trial court to grant a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) When, as in this case, a trial court has denied a motion for new trial based on a claim of ineffective assistance of counsel, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent that they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts established demonstrate a violation of the right to effective counsel and prejudice. (See *People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725 (*Taylor*).)⁴ "[A]n ineffective assistance

⁴ This standard differs from the abuse of discretion standard applicable to orders *granting* a motion for new trial based on ineffective assistance of counsel (see, e.g., *People v. Callahan* (2004) 124 Cal.App.4th 198, 209) and orders denying a motion for new trial on *statutory* grounds not implicating a constitutional right. (See *Taylor, supra*, 162 Cal.App.3d at p. 723.) The appellate briefing of both the People and Perez in this

claim made in a motion for new trial differs from one raised for the first time on appeal or petition for writ of habeas corpus. 'After all, the trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney.' " (*People v. Andrade* (2000) 79 Cal.App.4th 651, 660.)

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *People v. Frye* (1998) 18 Cal.4th 894, 979.) To establish a denial of the right to effective assistance of counsel, a defendant must show (1) his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland*, at pp. 687, 691-692; *Frye*, at p. 979.) "It is defendant's burden to demonstrate the inadequacy of trial counsel." (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

"Judicial scrutiny of counsel's performance must be highly deferential [because] [i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of

case fail to accurately cite the standard of review applicable to an appeal from an order denying a motion for a new trial based on ineffective assistance of counsel. Instead, the parties' briefs cite case law describing the abuse of discretion standard of review applicable to other types of new trial motions. However, even under the abuse of discretion standard of review cited by the parties, our resolution of this appeal would be the same.

counsel was unreasonable." (*Strickland, supra*, 466 U.S. at p. 689.) " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " . . . "[W]e accord great deference to counsel's tactical decisions" . . . , and . . . "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" ' " (*People v. Hinton* (2006) 37 Cal.4th 839, 876, citations omitted (*Hinton*).)

To show prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (*Id.* at p. 693.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)⁵

⁵ Perez contends that the trial court applied the wrong legal standard in assessing prejudice because it "failed to consider that doubt in the mind of one juror would have been sufficient to establish the prejudice element." Put another, way Perez contends that the trial court did not recognize that because a criminal verdict must be unanimous, a different outcome is reasonably probable if only *one* juror would have decided the case differently without defense counsel's errors. We reject the argument, as having reviewed the trial court's ruling, we see no indication that the trial court was acting under an incorrect understanding of the law on that issue. Perez also contends that in ruling on the motion for a new trial, the trial court "simply discounted each of the points presented by [Perez] supporting his motion rather than analyz[e] them" We disagree. As we have described, the trial court set forth a lengthy and thoughtful ruling on Perez's motion for a new trial.

B. *Perez's Arguments on Appeal*

On appeal Perez argues, as he did in the trial court, that Dicks's representation fell below the standard of care because Dicks did not hire an investigator, a criminalist or a pathologist. In general, Perez argues that if Dicks "had aggressively prepared for this trial, it is highly probable that one or more jurors would have had doubts about the People's evidence of [Perez's] guilt."

1. *Perez Has Not Established That Dicks's Failure to Hire an Investigator Constituted Ineffective Assistance or Resulted in Prejudice*

As in the trial court, Perez focuses only sparse attention on the argument that Dicks should have hired an investigator and fails to point to any helpful evidence that would have been uncovered had Dicks taken a different approach to investigating the case. The substance of Perez's argument concerning the hiring of an investigator is that Dicks performed incompetently because he "did not have any investigator search into the backgrounds of Razo and Montillo in an effort to find evidence with which to impeach their testimonies concerning how the attack occurred."

To establish ineffective assistance based on an alleged failure to investigate, a defendant "must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) The defendant "must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

As an initial matter, we note that the evidence does not support Perez's assertion that Dicks failed to look into the backgrounds of Razo and Montillo, at least to some extent. Indeed, in describing the steps he took to investigate the case, Dicks stated that he found out that Montillo "had a warrant out," and he followed up on getting all of the relevant Facebook entries for the victims.⁶

However, more importantly, Perez has utterly failed to describe what information Dicks would have uncovered had he investigated further into Montillo's and Razo's backgrounds that would have helped him in impeaching their version of events. Because Perez has not shown that any helpful information would have been uncovered, he has neither established that Dicks acted incompetently in conducting his investigation nor established that there is a reasonable probability of a different result had a different investigation been conducted.

2. *Perez Has Not Established That Dicks's Failure to Hire a Criminalist Constituted Ineffective Assistance or Resulted in Prejudice*

Pointing out that the only evidence connecting Perez to the crime was Razo's identification of him, Perez argues that "a [r]easonable and effective defense preparation would have recognized at the outset that sound tactical trial investigation would have focused on establishing the identification by Razo as flawed and questionable — in order

⁶ As Perez points out, during the evidentiary hearing, Dicks did state that he wished that he had sent his investigators to explore Razo's and Montillo's relationship with each other and to search for other people who may have had a motive to commit the crime. However, Dicks expressly recognized that he would only have been expected to uncover such evidence "[i]f there was something there," and there has been no showing that any such evidence exists.

to develop a reasonable doubt for a jury determining the facts in this case." Perez argues that "effective presentation of a forced entry would have raised reasonable doubts about Razo's testimony and therefore his identification of his attacker." Although Deputy Gill testified about the forced entry, Perez contends that Dicks should have presented the evidence through a criminalist to "fully develop" the evidence. Perez argues that "a competent defense counsel would unquestionably have presented evidence during its own case-in-chief which would cast doubt as to Razo's description of the origin of the attack, and consequently, call into question Razo's identification of the attacker."

We disagree. The trial court, which was in the best position to comment on the impact of the evidence as presented at trial, found that the issue of forced entry was adequately presented to the jury through the testimony of Deputy Gill. Further, as the trial court explained, although the removed piece of wood was mistakenly referred to as the "doorjamb" rather than the window molding, it was clear at trial based on the photographs presented what Deputy Gill was describing. Having reviewed Deputy Gill's testimony, we conclude, as did the trial court, that the evidence of forced entry was adequately put before the jury through the testimony of Deputy Gill.

Further, Dicks had a sound strategic reason for introducing the forced entry during his cross-examination of Deputy Gill rather than through a criminalist hired by the defense, as the testimony of a law enforcement officer called by the People would likely be more credible to the jury. We defer to defense counsel's reasonable tactical decisions in determining whether he competently represented the defendant. (*Hinton, supra*, 37 Cal.4th at p. 876.)

We also agree with the trial court that any error in failing to hire a criminalist to testify about the forced entry was not prejudicial. As the trial court pointed out, the jury was presented with evidence of forced entry, and defense counsel repeatedly emphasized that evidence during closing argument. We perceive no reasonable probability that the failure to introduce the evidence of forced entry through a criminalist impacted the outcome of the case. (*Strickland, supra*, 466 U.S. at p. 694.)⁷

3. *Perez Has Not Established That Dicks's Failure to Hire a Pathologist Constituted Ineffective Assistance or Resulted in Prejudice*

Perez argues that Dicks's failure to hire a pathologist negatively affected the defense because Dicks incorrectly argued that the hammer was used as a weapon in attacking Razo and Montillo, even though "the evidence of the injuries did not comport with that theory." Perez contends that "[i]t is highly probable that the jury recognized that the hammer was not the instrument used to conduct the attack, thus further discrediting trial defense counsel's attempted interpretation of the facts." We reject this argument.

⁷ Although Perez's argument is not clear, he also appears to contend that a criminalist should have been hired so that Dicks would be "prepared to cross-examine Montillo as to why, if he only lost a small amount of blood, did he gather up the bed comforter and put it in a garbage bag." Perez made a similar argument in the trial court as part of the motion for a new trial, arguing that a criminalist should have been hired to opine that the crime scene had been cleaned up. We reject Perez's argument because, as the trial court pointed out, Dicks's reasonable strategy was to point out that no blood was on the bed, which contradicted the victims' testimony that the attack of Montillo took place there. If a criminalist had emphasized the clean-up of the crime scene, including the bedding in the trash bag, that testimony would have undermined Dicks's strategy.

First, contrary to what Perez argues, there was no evidence presented at trial that directly contradicted Dicks's argument that the hammer could have been used in the attack. The only medical professional called to testify was Razo's treating doctor, and he was not asked whether the hammer could have been the weapon used. Instead, Perez's argument is based on his speculative assertion that any lay observer viewing the photographs of the victims' wounds would conclude that the hammer could not have made those wounds.

More importantly, as the trial court reasonably pointed out, even had a pathologist advised Dicks against arguing that the hammer was used as a weapon, the jury would still have been left with no clear idea of what weapon was used or what happened to that weapon. At least under Dicks's theory that the hammer was used as a weapon, Dicks was able to argue to the jury that it was doubtful that Perez committed the attack because his DNA evidence and fingerprints were not found on the hammer.

4. *Perez's Remaining General Arguments as to Dicks's Ineffective Representation Lack Merit*

Apart from focusing specifically on Dicks's failure to hire one of the three specific types of experts that he claims should have been consulted, Perez makes certain general arguments applicable to Dicks's purported lack of preparation.

First, Perez focuses on Dicks's testimony at the evidentiary hearing that he did not hire any experts because he believed he would have to give them evidence of the possibly incriminating jail call between Perez and his mother. Perez argues that Dicks was not required by any applicable rules to turn over such evidence to his experts, and that

accordingly, Dicks manifestly did not understand the rules of discovery or how to deal with expert witnesses. Perez argues, "It is clear that Dicks misunderstood the law of discovery and because of that misunderstanding, failed to go forward with reasonable steps in preparation for trial"

We need not and do not evaluate whether Dicks misunderstood the discovery rules or how to deal with expert witnesses. As we understand Dicks's testimony, his concern about the materials he would be required to give to his experts was only one of the reasons he decided that hiring experts would not advance his defense of Perez's case. As we have explained, and as the trial court also concluded, Dicks reasonably concluded that hiring an investigator, a criminalist and a pathologist would not materially assist the defense of Perez's case under the strategy that he had formulated, regardless of any other concerns that may have caused him to make that decision. Further, as we have explained, Perez has not established that Dicks's decision not to hire experts was prejudicial, regardless of the basis for Dicks's decision.

Second, Perez also makes an argument based on a mischaracterization of Dicks's testimony at the evidentiary hearing, claiming that Dicks thought it would be futile to hire experts to assist in preparing his cross-examination and impeachment of Razo and Montillo because the prosecution would simply find a way to counter his impeachment. Perez repeatedly makes claims such as that Dicks did not "cross-examine the witnesses concerning the inconsistencies in their testimonies and the conflicts with the crime scene evidence" because he purportedly "speculated that if he conducted such a cross[-]examination, the People would be prepared to rebut the points he was making,"

and that Dicks was "unprepared to cross-examine the two persons assaulted because he believed that the People were always prepared to explain away any impeachment he might raise[]."

In fact, Dicks *did* extensively and effectively cross-examine Razo and Montillo at trial on numerous subjects. Only as to the *specific issue* of whether to cross-examine Razo about the evidence of *forced entry* did Dicks testify that he decided to forego that cross-examination. Dicks explained that he did not want to give the People an opportunity to develop an approach to addressing the issue of the forced entry by highlighting it in his cross-examination of Razo early in the case. Significantly, Cotsirilos testified that he may have taken the same approach as defense counsel, as it is arguably more powerful to have the evidence of the forced entry speak for itself rather than to confront a witness with it. Therefore, there is no reason to conclude that Dicks was ineffective in his decision not to cross-examine Razo about the forced entry, and there is no reason to believe that the decision to forego that cross-examination had anything to do with the failure to hire an investigator, a pathologist or a criminalist.

Finally, Perez relies heavily on *People v. Frierson* (1979) 25 Cal.3d 142, 160, to argue that Dicks's failure to hire expert witnesses constituted ineffective assistance of counsel. However, *Frierson* is inapposite. In *Frierson*, a death penalty case, the defendant argued that defense counsel was ineffective in failing to hire a psychiatrist or other professional as an expert witness to support a theory of diminished capacity. (*Ibid.*) Although defense counsel claimed he made a strategic decision not to hire an expert, our Supreme Court explained that "even tactical decisions may demonstrate incompetence if

made without the benefit of 'substantial factual inquiry.' " (*Id.* at p. 163.) *Frierson* explained that had defense counsel undertaken an investigation by consulting a psychiatrist, he would have learned that angel dust, which the defendant had ingested on the day of the crimes, "may significantly diminish the actor's capacity to form a criminal intent." (*Id.* at p. 164.) *Frierson* explained that "in a capital case, where diminished capacity appears to be the *sole* potentially meritorious defense, and counsel has in fact elected to present such a defense at trial, counsel must be expected to take those reasonable measures to investigate the factual framework underlying the defense preliminary to the exercise of an informed choice among the available tactical options, if any." (*Ibid.*)

Here in contrast, as we have explained as to each category of expert, Perez has not pointed to any evidence that Dicks would have obtained from an investigator, a pathologist or a criminalist that would have materially improved his ability to make an informed tactical decision about what defense to present. With respect to the investigator, Perez has not identified what information would have been obtained to inform Dicks's trial strategy. As to a criminalist, the trial court found that Dicks already knew about the forced entry, and Dicks was able to present that evidence through Deputy Gill. Further, the fact that the crime scene had been cleaned up and bedding was put in a trash bag was also apparent from the crime scene photographs, and highlighting that evidence would have been inconsistent with Dicks's focus on the lack of blood on the bed. Finally, had Dicks hired a pathologist to provide information about the type of weapon or weapons used in the attack, he would not have learned anything that would

help him present a meritorious defense, as the pathologist's testimony would have simply left the jury with the conclusion that one or two weapons were involved and that none of the weapons involved were found at the scene.

In sum, we conclude that Perez did not meet his burden on his motion for a new trial on either prong of the *Strickland* analysis, as he did not establish that Dicks performed below an objective standard of reasonableness under prevailing professional norms or that there was a reasonable probability of a different outcome if Dicks had conducted himself differently. (*Strickland, supra*, 466 U.S. at pp. 687, 691-692.) Accordingly, the trial court properly denied the motion for a new trial.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.